(2) Supreme Court, U.S.
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No. 04-63

IN THE

Supreme Court of the United States

DAVID B. CORNEAL AND SANDRA Y. CORNEAL,
Petitioners

v.

JACKSON TOWNSHIP, HUNTINGDON COUNTY, PENNSYLVANIA, ET AL.,
Respondents

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case raises the important and recurring question of the uncertain character of the standard of official conduct required to establish a substantive due process violation in cases involving property rights, and the respective roles of the judge and jury in determining such claims. In a case involving unhurried official conduct, the District Court acknowledged the unlawfulness of a moratorium, and a jury question as to whether that and other related actions were motivated by personal animus towards the property owner. The District Court and the Third Circuit invoked *County of Sacramento v. Lewis* to hold that the officials were entitled to summary judgment because Petitioners had not established that the conduct was solely motivated by personal animus and "*completely unrelated in any way* to a rational land use goal" and thus could not satisfy the shocks the conscious standard of conduct. The questions presented for review are:

1. Whether in a property rights case involving unhurried official conduct already found to raise a jury a question as to improper motive, the legal standard of conduct necessary to establish a substantive due process violation requires a property owner to establish that the officials' conduct was solely motivated by an intent to harm and completely unrelated in any way to a rational land use goal?

2. Whether it is the province of the jury to decide whether the officials' asserted land use goal is legitimate; if there exists a legitimate goal, whether the challenged official conduct advanced that goal or was a pretext to justify that conduct; and whether the challenged conduct, in fact, shocks the contemporary conscience?

PARTIES TO PROCEEDING

The Petitioners are David B. and Sandra Y. Corneal, husband and wife, Plaintiffs in the District Court.

The Respondents are:

Jackson Township, Huntingdon County, Pennsylvania;

W. Thomas Wilson, individually and in his official capacity as a Supervisor of Jackson Township;

Michael Yoder, individually and in his official capacity as a Supervisor of Jackson Township;

Ralph Weiler, individually and in his official capacity as a Supervisor of Jackson Township;

Barry Parks, individually and in his official capacity as the Sewage Enforcement Officer of Jackson Township;

David Van Dommelen, individually and in his official capacity as the Building Permit Officer of Jackson Township;

Ann L. Wirth, individually and in her official capacity as Secretary of Jackson Township; and

Larry Newton, individually and in his official capacity as Solicitor to Jackson Township.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a) is unpublished, but available at 94 Fed. Appx. 76, 2004 U.S. App. LEXIS 7198 (3d Cir. Apr. 13, 2004). The opinion of the District Court (App. 5a) granting summary judgment is reported at 313 F. Supp. 2d 457 (M.D. Pa. 2003). The previous opinion of the District Court denying summary judgment (App. 37a) is unpublished.

JURISDICTIONAL STATEMENT

The Court of Appeals entered its judgment on April 13, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The 14th Amendment to the United States Constitution provides in relevant part:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law.

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This case presents questions of far-reaching practical importance to the Fourteenth Amendment's substantive due process protection of rights in private property. In this particular case, the trial judge acknowledged: (1) a jury question as to the Respondent officials' improper motivation, including personal animus towards the Petitioners; (2) the unlawfulness of a subdivision moratorium hastily and illegally enacted; and (3) a host of other adverse actions taken towards Petitioners. The trial judge, apparently relying on previously undisclosed hearsay letters from one citizen produced for the first time in summary judgment proceedings, held that Respondents at most were acting with mixed motives, thus they had a rational land use goal and Petitioners had failed to demonstrate that the Respondents' actions were "completely unrelated in any way to [that] rational land use goal." Therefore, the District Court held, Petitioners as a matter of law could not establish that the Respondents' conduct shocked the conscience, the necessary prerequisite for a violation of substantive due process rights. (App. 18a-22a, 24a-27a). The Third Circuit upheld the District Court with little analysis other than to agree with the stated standard of conduct.

This approach is a departure from the standard of conduct set forth in this Court's substantive due process jurisprudence, and prevents the jury from considering evidence that the totality of the official acts under the circumstances were so egregious as to constitute arbitrary and irrational conduct in the constitutional sense, and from considering disputed evidence that the goal itself was a pretext to justify the actions towards the property owner, and that the official was not acting in pursuit of the stated goal.

A. Background

Petitioners brought an action to seek redress for official conduct by Respondents, which, Petitioners contend, was so egregious as to be arbitrary and irrational in the constitutional sense. Admissions, undisputed evidence, and stipulations for trial showed that Respondents took a series of actions that continually obstructed the Petitioners' right to build a home on their property because Respondents did not want "trouble-making yuppie[s] from over the mountain," settling into their rural community. The Respondents defended that all of their actions arose out of concern for controlling the growth of residential land development in their Township, while Petitioners pointed to evidence that the stated concern was contrived as an excuse to justify the Respondents' obstruction of their property rights, and that the challenged actions did not further the stated goal.

On initial cross-motions for summary judgment,[1] Petitioners relied on admissions and undisputed evidence that included:

- There had been no acceleration in requests for building permits and the requests had remained stable for the previous ten years, at about 37 per year, for all structures, including garages and other outbuildings (R. A734, A904, A1049, A1071);

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[1] The summary judgment motions involved all Respondents with the exception of Respondent Newton, who had been dismissed from the case on a motion pursuant to Rule 12(b)(6). Although the Petitioners appealed that dismissal to the Third Circuit, the propriety of the District Court's actions with regard to Respondent Newton's dismissal is not before this Court because the Third Circuit never decided those issues, deeming them moot in light of its holding with regard to the Petitioners' substantive due process claims.

- One Respondent's personal interest in the property (R. A634-35);
- The absence of a subdivision ordinance, and the imposition of a hastily enacted and illegal building moratorium on subdivisions, assertedly out of concern over controlling an increase in building and development (App. 7a);
- The refusal of the Respondent building permit officer, at the instruction of the Respondent supervisor with the personal interest in the property, to give Petitioners even an *application* to apply for a building permit for anything, even outbuildings that did not require subdivision approval or septic, because Respondents considered husband Petitioner a "trouble-making yuppie from over the mountain" (R. A704-06, A710, A1068, A1065, A709);
- Respondents' refusal to *review* the Petitioners' building submissions (R. A592, A711-12);
- A wetlands violations report made by the Respondent supervisor with the personal interest in the property determined to be meritless (R. A660-61);
- The Respondents' demand for compliance with requirements in the absence of related ordinances or regulations (App. 7a);
- Respondents' insistence that where one residence existed on Petitioners' 95-acre tract of land, building just one additional residence would constitute a subdivision forbidden by the illegally imposed moratorium (R. A499);
- Informing the attorney for a third party that had contracted to buy the existing dwelling and a portion of the 95 acres, that the

Respondents would not grant the necessary approvals, thereby causing the third party to abandon the contract (R. A761, A919, A1074); and

- The filing of an injunctive action to prevent Petitioners from building one additional residence on their property (R. A1074).

In addition to these admission and undisputed facts, there was disputed evidence about the extent of the interested Respondent's interest in the Petitioners' property, and whether providing the information that led the third party to abandon the contract to purchase the existing dwelling and a portion of the tract was intended to cause that result.[2]

The District Court initially held that this array of evidence raised a disputed fact as to whether Respondents' actions were motivated by improper personal animus against Petitioners, rather than a rational land use goal, denied summary judgment on the substantive due process claim, and scheduled the case for trial. (App. 50a-51a). At the time, Third Circuit jurisprudence held that substantive due process plaintiffs asserting property deprivations had to show that the government's actions were "motivated by bias, bad faith, or improper motive, such as partisan political reasons or personal reasons unrelated to the merits of the plaintiffs' application." *Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988); *Midnight Sessions, Ltd. v. Philadelphia*, 945 F. 2d 667, 683 (3d Cir. 199).

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[2] The District Court and the Third Circuit concluded that Petitioners' evidence was insufficient to establish the state law tort of intentional interference with contractual relations. Notwithstanding the grant of summary judgment on Petitioners' intentional interference claim, the evidence produced in support of that claim still serves as evidence of the Respondents' concerted efforts to deprive the Petitioners of their property rights.

Shortly before the scheduled trial, the Respondents brought to the District Court's attention the then-recently issued opinion in *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003), in which the Third Circuit overruled its own *Bello v. Walker* and its progeny insofar as those decisions had held that a plaintiff may establish a substantive due process violation in the context of land use cases by showing that official conduct was the result of improper motives. The *United Artists* Court held that in the wake of this Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), plaintiffs in such cases may make the required showing only if they demonstrate that the official conduct shocks the conscience, and remanded the case for a determination as to whether the plaintiff could survive summary judgment under that standard. *United Artists*, 316 F.3d at 402. In doing so, the *United Artists* Court acknowledged that the meaning of the shocks the conscience standard varies depending on the factual context. *Id.* at 400.

In light of *United Artists*, the District Court invited a renewed motion for summary judgment from Respondents in this case. (App. 34a-36a). In connection with the renewed motion, the Respondents relied on the same summary judgment evidence as was submitted in the original summary judgment proceedings, except that Respondents for the first time submitted hearsay letters from a citizen, one of which post-dated the moratorium and which were not previously identified, purportedly suggesting community concern over controlling development in the township, which Respondents urged provided a basis for the moratorium. (R. A1146-48; Supp. R. at 1).

The District Court acknowledged the illegality of the moratorium at this juncture as well as the jury question concerning improper motive. The District Court granted the

Respondents' renewed motion for summary judgment, however, reasoning that the standard enunciated in *Sacramento v. Lewis*, and adopted by the Third Circuit in *United Artists* for cases involving deprivation of property, compelled the conclusion that as a matter of law, the Petitioners could not prevail on their substantive due process claim because, although the evidence suggested mixed motives for the Respondents' actions, one legitimate and the other illegitimate, they had not produced evidence sufficient to show that the Respondents actions were "completely unrelated in any way to a rational land use goal." The Court further held that all of the remaining state law claims failed because their claim under Section 1983 failed. (App. 18a). Specifically, the District Court held that:

> [T]o survive summary judgment under the "shocks the conscience" test ... the Corneals must have adduced evidence from which a reasonable jury could conclude that the Board's actions did not serve any rational land use purpose. As a result, unless the evidence indicates that the challenged decision is completely unrelated in any way to a rational land use goal, there is no violation of substantive due process.
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> ***
>
> [T]he Court finds that the totality of the facts, when viewed in the light most favorable to the Corneals, establishes that the Board may have acted with mixed motives; one related to a legitimate land regulation purpose (preserving land development status quo during the final approval process of the subdivision ordinance), the other related to illegitimate personal animus.
>
> ***

> As a result, the plaintiff must demonstrate that the land use decision or regulation was so totally irrational that it could not possibly be the real reason for the locality's action or, alternatively, that the locality applied its decision selectively so that its land use concern could not have been legitimate despite the rational basis for it.

(App. 18a, 22a, 24a).

The Petitioners timely appealed to the Third Circuit the grant of summary judgment as well as the Orders granting Respondent Newton's motion to dismiss and denying the Petitioners' motions for reconsideration and request for leave to amend the Complaint. On appeal, Petitioners argued that a jury should have been permitted to decide whether the stated concern was legitimate or a pretext for the Respondents' actions, and whether, in the context at issue, the totality of the Respondents' actions shocked the conscience. Petitioners argued that in contrast to the police in *Sacramento v. Lewis*, these Respondents had time to make unhurried judgments, and that a reasonable jury could have found that the improper motives led to actions taken with intent to harm or deliberate indifference, and made an ultimate determination that the overall actions taken were conscience shocking. Petitioners further argued that *Sacramento v. Lewis* did not hold that a substantive due process plaintiff outside the context of a police chase must establish the complete absence of any relation whatsoever to a legitimate governmental goal.

The Third Circuit, however, affirmed the judgment of the District Court and adopted, without elaboration or discussion, its conclusion that "unless the defendants' actions were 'completely unrelated in any way to a rational land use goal,' there is no violation." The Third Circuit found that

although the evidence may have shown personal animus, "under *United Artists*, mere improper motives are not conscience shocking." (App. 3a). (citing *Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)). The Third Circuit also relied on two decisions from the Eighth Circuit, both of which predated *Sacramento v. Lewis*.

The Third Circuit has created a standard that requires a substantive due process plaintiff to establish at summary judgment that the official conduct was solely motivated by an intent to harm, and that the actions were completely unrelated to a stated land use goal. It also removed from the jury the disputed questions of fact tying the challenged actions to an asserted rational goal, and the ultimate question of whether the conduct shocked the conscience. This ruling and the rulings of other Circuits around the country, leave in disarray and conflict the contours of the shocks the conscience standard as well as the role of the judge and jury in addressing the evidence in substantive due process cases involving real property.

REASONS FOR GRANTING THE WRIT

This case presents two recurring questions of great constitutional importance: what is the standard of conduct required to establish a substantive due process violation by an unhurried land use official against a property owner; and what are the roles of the judge and jury in determining the various issues that must be decided in order to make the ultimate determination of whether the official conduct violates substantive due process rights. In *Sacramento v. Lewis*, this Court held that the actions of a police officer in a high speed chase that resulted in the death of a suspect cannot give rise to a substantive due process violation unless the conduct "shocks the conscience," which, in turn, requires a showing of intent to harm the suspect physically or to worsen

his legal plight. *Sacramento v. Lewis*, 523 U.S. at 846, 853-54. In defining the contours of the shocks the conscience standard of conduct, this Court was careful to distinguish situations in which officials have the luxury of time to make unhurried judgments largely uncomplicated by the demands of competing obligations, and emphasized that in such circumstances deliberate indifference, as opposed to intent to harm, could shock the conscience. *Id.* at 852-53. Despite this, there exists a growing trend among the courts of appeals to fail to distinguish between situations involving time for reflection and those involving the need for instant judgments. The Third Circuit's decision cannot be reconciled with the reasoning and pronouncements of *Sacramento v. Lewis* and earlier decisions of this Court concerning the standard of conduct required to establish violations of substantive due process rights. Furthermore, the Circuits have developed an array of "substandards" to define exactly what is required for the conduct of a land use official to shock the conscience in exercising power over the property owners' property rights.

Moreover, in deciding substantive due process land use cases, the decisions below and of the other Circuit Courts reveal an approach to making threshold factual and legal determinations, necessary to reach the question of whether official conduct violates substantive due process rights, that conflicts with this Court's jurisprudence. The District Courts and the Courts of Appeals are greatly in need of guidance to create a uniform approach to the questions of whether it is the province of the judge or the jury to decide whether a legitimate land use goal exists, in cases where there is evidence suggesting otherwise; whether the actions taken furthered any legitimate goal; whether the stated goal is merely a pretext for imposing unfavorable and arbitrary requirements upon a property owner; and whether, taken as a whole, the conduct at issue rises to the level of arbitrary and

irrational conduct in violation of substantive due process rights.

This Court should grant a writ of certiorari because the decision of the Third Circuit and other circuits directly conflict with the decisions of this Court. Further, these decisions reveal conflict and disarray among the Circuit Courts as to the character of the standard of conduct required to establish a violation of substantive due process in cases involving deprivation of property rights and unhurried official conduct, including whether the facts must be evaluated by the jury. These issues implicate important and recurring questions of federal constitutional law, and this Court has not previously provided guidance in this precise area of substantive due process jurisprudence.

A. The Decision Below Conflicts With This Court's Rulings.

It is now beyond dispute that the Fourteenth Amendment guarantees more than the rights preserved by specific constitutional provisions, and includes protection of certain substantive rights, "barring certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986), *cited in Sacramento v. Lewis*, 523 U.S. at 840. The District Court below concluded that Petitioners had a constitutionally protected substantive due process right to use and enjoy their property, free of arbitrary and irrational government interference. (App. 17a). The Respondents below did not challenge that determination, and the Third Circuit accepted it as well. Thus, Petitioners have asserted a property right entitled to substantive due process protection, a violation of which is properly challenged under 42 U.S.C. § 1983. *See, e.g., Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (substantive due process violations are actionable

under § 1983), *cited in Sacramento v. Lewis*, 523 U.S. at 840; *see also DeBlasio v. Zoning Bd. Of Adjustment for the Township of W. Amwell*, 53 F.3d 592, 600-01 (3d Cir. 1995), *overruled on other grounds by United Artists*, 316 F.3d 392 (3d Cir. 2003).

This Court has explained that since the time of early explanations of due process, it has understood the core of the concept to be protection against arbitrary action. *Sacramento v. Lewis* at 845. "[T]he touchstone of due process is protection of the individual against arbitrary action of government," *id.* (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)), preventing government officials from abusing their power, or employing it as an instrument of oppression. *Collins v. Harker Heights*, 503 U.S. 115, 126 (1992) (internal quotations omitted), *quoted in Sacramento v. Lewis*, 523 U.S. at 846.

With these principles as a foundation, in *Sacramento v. Lewis*, this Court considered the appropriate standard of culpability for evaluating executive conduct in lawsuits asserting substantive due process violations. Although the Court's analysis in *Sacramento v. Lewis* was limited to the question of culpability of a law enforcement officer in the context of a high-speed vehicle chase, *Sacramento v. Lewis* at 839, the Court provided useful guidance regarding the appropriate standard in all substantive due process claims. The Court reiterated that only executive abuse of power that shocks the conscience meets the standard, and acknowledged that "[w]hile the measure of what is conscience-shocking is no calibrated yard stick, it does, as Judge Friendly put it, 'point the way.'" *Id.* at 846-47 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)). The Court noted that the two ends of the spectrum of conduct, negligence and intent to injure, are neither absolute nor exclusive definitions of what is, and what is not, conscience-shocking; the range of

conduct between these two points "is a matter for closer calls." *Id.* As the Court stated:

> Rules of due process are not [...] subject to mechanical application in unfamiliar territory. Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking. What we have said of due process in the procedural sense is just as true here: The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

Sacramento v. Lewis at 850 (quoting *Betts v. Brady*, 316 U.S. 455, 462 (1942)).

Thus, this Court defined the contours of the shocks of the conscience standard for executive conduct in substantive due process cases, involving death, personal injury or bodily invasion. The Court has not, however, provided crucial guidance on the application of the shocks the conscience standard to cases involving executive conduct concerning property rights. Although the Court has considered land use

cases in the context of equal protection, *see, e.g., City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003), and of takings, *see, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), it has not defined the contours of the standard of conduct in the circumstances of local land development and planning that could be "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *See Sacramento v. Lewis* at 847 n.8.[3]

In approving the District Court's adaptation of *Sacramento v. Lewis* to the conduct of land use officials, the Third Circuit failed completely to make the distinction between hurried and unhurried conduct. The Third Circuit also ignored this Court's clear indication that *Sacramento v. Lewis*' intent to harm requirement was directed specifically to police chases. Moreover, the Third Circuit set down even more stringent requirements, defining a rigid and absolute test that would require a showing that the challenged conduct was *solely* motivated by an intent to harm and *completely* unrelated in any way to a stated rational land use goal. This approach would have district courts decide as a matter of law that conduct does not shock the conscience despite the presence of outrageous and even illegal conduct taken with personal animus towards the property owner, as long as the governmental actor asserts that the challenged conduct was related in any tangential and tenuous way to an asserted land use goal. This standard eviscerates the protections of the due process clause against governmental officials who would "abuse [their] power, or employ [it] as an instrument of oppression." *Sacramento v. Lewis*, 523 U.S. at 846 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 126 (1992)). Under that standard, a government officer may exhibit egregious

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[3] Petitioners' discussion of the proper role of the judge and jury in determining whether a stated governmental goal is legitimate as opposed to a pretext for abusive conduct, is reserved for Section C, below.

and outrageous conduct that nevertheless would not shock the contemporary conscience. *Sacramento v. Lewis* at 847 n.8. This can not be reconciled with this Court's reasoning and pronouncements in defining a minimum standard of conduct required to establish a substantive due process violation in police chase cases.

The Third Circuit repudiated this Court's direction in *Sacramento v. Lewis* that the phrase due process of law formulates a concept that is less rigid and more fluid, and requires consideration of official conduct on a case by case basis, an exact analysis of circumstances for the purpose of preserving the constitutional proportions of substantive due process. *Sacramento v. Lewis*, 523 U.S. at 850. It also ignored this Court's instruction that an asserted denial is to be tested by an appraisal of the "totality of facts in a given case." *Id.* (quoting *Betts v. Brady*, 316 U.S. at 462). The Third Circuit also repudiated this Court's guidance that official conduct must be measured by a sliding scale that takes into account the circumstances of the case.

This Court has noted that "deliberate indifference" may be conscience shocking where the state actor has the luxury of time to consider his actions, such as in the context of a custodial prison situation, but may not be conscience shocking in exigent or emergent circumstances where the state actor is making decisions in haste and under pressure, such as in the context of a prison riot or, in the case presented in *Sacramento v. Lewis*, a high-speed police chase. *Id.* at 852. Therefore, in the context of a rapidly evolving situation in which the state actor has no time for deliberation or reflection, such as a high-speed car chase, only a purpose to cause physical harm or to worsen the plaintiff's legal plight could give rise to liability under the Fourteenth Amendment. *Id.* at 854. The Third Circuit apparently heeded only the language of *Sacramento v. Lewis* concerning "purpose to

cause harm unrelated to the legitimate object of arrest," *Sacramento v. Lewis*, 523 U.S. at 836, language that was specifically targeted to police chases.

Sacramento v. Lewis does not counsel that the standard to be applied to a high-speed police chase would apply equally in the context of municipal land use decisionmaking. Indeed, the Court specifically refrained from concluding that, even in an emergency situation, only an intent to harm could "shock the conscience." *Id.* at 852. In any event, the district courts will almost never be presented with a situation in which local officials are making decisions under pressure and without time for reflection in cases involving property rights. Thus, property cases are more properly analogized to the custodial detention cases in which the Court has found that "deliberate indifference" to the rights of the plaintiffs will shock the conscience. *See Sacramento v. Lewis* at 849-850, 851 ("markedly different circumstances of normal pretrial custody and high-speed law enforcement chases shows why the deliberate indifference that shocks in the one case is less egregious in the other.")

The decision of the Third Circuit and others reflects the growing trend among federal courts to resist hearing any cases that may be categorized, however tangentially, as "land use disputes." The stock phrase intoned by the federal courts, pressed into service in this case, is that they "do not want to be sitting as federal zoning courts of appeals." The Third Circuit and District Court below effectively reduced this Court's jurisprudence on the shocks the conscience standard to a tool to justify the refusal of the federal courts to entertain claims concerning the actions of local government towards property owners, no matter how egregious, arbitrary and unlawful was the conduct of the local government actors, and tenuous a relation the stated land use goal. As Judge Cowen,

however, noted in his dissent to the Third Circuit's opinion in *United Artists*:

> I agree with the Majority that land use decisions are generally issues of "local concern." But these very same decisions *necessarily* assume a constitutional dimension when the calculated, intentional and deliberate abuse of government power is at hand. *See Lewis*, 523 U.S. at 846.... The concern that the federal Judiciary will become a local zoning board takes a permanent backseat to the federal Judiciary's obligation to protect the core constitutional freedoms of the American public from *deliberate* and *intentional* governmental deprivation.

United Artists, 316 F.3d 392, 407 (3d Cir. 2003) (Cowen, J., dissenting) (emphasis in original). *Sacramento v. Lewis* should not be read to deprive property owners of the substantive due process protection from arbitrary and irrational official government actions simply because they are categorized as land-use actions.

B. The Lower Courts Have Inconsistently Defined the Contours of the Shocks the Conscience Standard for Property Rights.

The Circuit Courts' uncertainty as to the meaning of "shocks the conscience" outside of the personal injury or bodily invasion context is apparent. Rather than consider the contextual framework of each individual case, in their application of the "shocks the conscience" standard to substantive due process cases involving real property interests, many courts of appeals instead have adopted a virtually insurmountable all-or-nothing standard, and have all

but written the word "property" out of the Fourteenth Amendment. The Third Circuit's application of the concept provides the most dramatic example because of its recent shift from the "improper motive" test to the "shocks the conscience" test.

In overruling its line of cases that held that denial of property rights for "improper motives" established a violation of substantive due process, and holding that under this Court's ruling in *Sacramento v. Lewis*, the "shocks the conscience" test must be applied to land use cases, the Third Circuit failed to provide any guidance regarding the relationship between the two tests, other than to opine that the latter is more stringent. *See United Artists*, 316 F.3d at 400. But in this case, the Third Circuit equated "conscience shocking" with "motivated solely by an intent to harm." Additionally, although the Third Circuit in *United Artists* acknowledged this Court's guidance in *Sacramento v. Lewis* that the determination of whether executive conduct is conscience shocking must be made in the context of a particular case, the Third Circuit has now adopted an "all-or-nothing" approach, holding that "unless the defendants' actions were 'completely unrelated in any way to a rational land use goal,' there is no violation" of substantive due process. (App. 3a). Thus, the Third Circuit imposed on the standard of conduct two absolute and rigid requirements: one of "intent solely to harm" and another of "*completely* unrelated."

Other Circuits have adopted stringent tests, which achieve similar end results (the categorical rejection of substantive due process as a vehicle for redress in real property matters), but each utilizes different language to define the contours. For example, the First Circuit continues its long tradition of recognizing substantive due process protections in land use cases only if they involve

"fundamental procedural irregularity, racial animus, or the like," even where planning officials clearly violate the state scheme under which they operate. *See Creative Env'ts, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982). Most recently, the First Circuit has declined to observe the sliding scale for land use claims, stating that: "We have consistently rejected substantive due process claims arising out of disputes between developers and land planning authorities while leaving the door 'slightly ajar' for 'truly horrendous situations.'" *Macone v. Town of Wakefield*, 277 F.3d 1, 9 (1st Cir. 2002) (quoting *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 45 (1st Cir. 1992). Indeed, the First Circuit's refusal to recognize substantive due process protection in land use cases is almost without exception. *See, e.g., Collins v. Nuzzo*, 244 F.3d 246, 250 (1st Cir. 2001) (substantive due process rejected despite alleged retaliation by local licensing board); *Baker v. Coxe*, 230 F.3d 470, 474 (1st Cir. 2000) ("arbitrary denial of a permit in violation of state law – even in bad faith – does not rise above the constitutional threshold for ... substantive due process claims").

The Second Circuit has held that, for a landowner to prevail, it must demonstrate that the defendants' actions were "so outrageously arbitrary as to constitute a gross abuse of government authority." *See Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999) (citing *Sacramento v. Lewis* at 846); *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 17 (2d Cir. 1999). The Second Circuit, however, has collapsed its "arbitrary" standard into an all-or-nothing rational basis standard, concluding that a governmental determination though it may be outrageously arbitrary, violates substantive due process only if it has "no legitimate government purpose." *See Natale* at 263; *Harlen Assocs. v. Village of Mineola*, 273 F.3d 494, 505 (2d Cir. 2001) (citing *Crowley v. Courville*, 76 F.3d 47, 52 (2d Cir. 1996)); *Lisa's*

Party City, 185 F.3d at 17. The Fourth and Tenth Circuits have adopted similar analyses. *See, e.g., Tri-County Paving v. Ashe County*, 281 F.3d 430, 440 (4th Cir. 2002); *Crider v. Bd. of County Comm'rs of Boulder*, 246 F.3d 1285, 1289 (10th Cir. 2001) (plaintiff must show absence of *conceivable* rational relationship between the government act and a legitimate governmental objective).

The Fifth Circuit has applied the "shocks the conscience" test to alleged deprivations of real property rights with varying approaches. For example, in *Conroe Creosoting Co. v. Montgomery County*, 249 F.3d 337 (5th Cir. 2001), a local tax collector seized and sold at auction all of the assets of the plaintiff in violation of state law, and signed a false affidavit in support of the tax warrant, causing the plaintiff to permanently go out of business. *Id.* at 341-42. With no reference to a rational basis formulation, the Fifth Circuit concluded that the plaintiff had presented sufficient evidence to allow a jury to consider whether the defendant's actions were "shocking to the conscience." *Id.* at 342. By contrast, only one year earlier, the Fifth Circuit in *Simi Inv. Co. v. Harris County*, 236 F.3d 240 (5th Cir. 2000) applied a "rational basis" test. There, a county had sought to block the plaintiff's access to its property to a street by claiming that it had established a park on an intervening, five-foot-wide strip of land. *Id.* at 245-46. The Court framed the ultimate legal question as "whether this denial is rationally related to a legitimate governmental interest," and concluded that because the county could not demonstrate the existence of a park and the asserted existence of the park served no legitimate governmental purpose, the defendants acted without a rational basis, in violation of plaintiff's substantive due process rights. *Id.* at 251-54; *see also Bituminous Materials, Inc. v. Rice County*, 126 F. 3d 1068, 1070-71 (8th Cir. 1997) (despite personal animus, zoning board "had rational bases" to restrict the plaintiff's permit and, therefore,

did not violate substantive due process); *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F. 2d 1102, 1105 (8th Cir. 1992) ("[a] bad-faith violation of state law remains only a violation of state law").

These Circuits have adopted some version of the "all-or-nothing" rigid approach utilized by the Third Circuit in this case, requiring a plaintiff to demonstrate the complete absence of any relationship between a defendant's conduct and any legitimate governmental purpose. In no other area of the law is the burden on a plaintiff so onerous. Even in the context of the high-speed chase, a defendant's conduct can shock the conscience where there is a purpose to cause physical harm *or* worsen the suspect's legal plight. *Sacramento v. Lewis*, 523 U.S. at 854. Nothing in *Sacramento v. Lewis* suggested that the intent to harm must be the only intent or motivation of the official. Moreover, even if *Sacramento v. Lewis* properly could be read to require that the only intent be an intent to harm, as described in Section C, *infra*, where there is a genuine issue of material fact as to true intentions, a jury, not a court, should determine that fact.

Indeed, in no other legal framework, where a defendant can avoid liability by presenting a facially valid reason for his challenged actions, is the plaintiff required to prove at the summary judgment stage of proceedings that the complained of action is "completely unrelated" to the proffered justification. For example, an employer accused of illegal discriminatory action may articulate a nondiscriminatory reason for the action. The plaintiff, however, still can prevail by showing employer's explanation is pretextual. *See, e.g., Raytheon Co. v. Hernandez*, --- U.S. ---, 124 S. Ct. 513, 518, 157 L. Ed. 2d 357, 364 (2003). The jury then gets to decide a disputed issue of intent where there is sufficient conflicting evidence on this point, and even

where there is evidence of mixed motives, liability is found upon a jury determination that discriminatory bias was a "determining and motivating factor" in the matter. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48, 153 (2000); *see also Matthews v. Lucas*, 427 U.S. 495, 510 (1976) (where the defendants have articulated a facially rational basis for their actions, the plaintiff may still prevail by demonstrating the insubstantiality of that alleged relation).

The Third Circuit's "all-or-nothing" approach in this case, however, effectively eliminates the opportunity for a plaintiff to rebut a defendant's asserted rational basis by requiring the plaintiff to prove, at summary judgment, that the defendants actions are "completely unrelated" to any legitimate state interest. Moreover, this construction of the plaintiff's burden is at odds with the well-settled principle that, at the summary judgment stage, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). If any articulable rational basis for a defendant's actions entitles the defendant to summary judgment, then the court is drawing all inferences in favor of the defendant as movant, and not in favor of the plaintiff as nonmovant.

The inconsistency in the formulation of the shocks the conscience standard within these Circuits, and the trend of applying an "all-or-nothing" evidentiary standard at the summary judgment stage of proceedings, demonstrates the necessity of guidance from this Court in analyzing substantive due process cases to preserve the protection of real property rights afforded by the Fourteenth Amendment to the Constitution. Review by this Court is necessary to ensure consistency between this Court's decisions and the Circuit Courts, and to define the appropriate standard by

which executive conduct must be measured in substantive due process cases involving asserted deprivation of real property rights through arbitrary and irrational government interference.

C. The Third Circuit's Decision Conflicts With The Decisions of This Court Concerning the Role of the Court and Jury in Weighing Evidence and Determining Issues in Substantive Due Process Claims.

The Third Circuit's disposition also conflicts with the decisions of this Court concerning the role of courts and juries in weighing the evidence and making credibility determinations for the purposes of addressing whether a stated goal is legitimate or rational or a pretext contrived to justify the official's conduct; whether the official's actions were in furtherance of and rationally related to the stated goal; and, ultimately, whether the totality of the actions rises to the level of arbitrary and irrational conduct so as to constitute a substantive due process violation.

It is beyond dispute that questions of fact must be determined by the fact-finder, i.e., the jury. Indeed, as this Court stated in *Anderson v. Liberty Lobby, Inc.*:

> Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a

> directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.

477 U.S. 242, 255 (1986).

This Court has held that the question of whether the contested government action substantially advances a legitimate governmental interest is a mixed question of law and fact, and, in context, the question of "advancement" is one for the jury. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721 (1999). The ultimate question of intent, which is undeniably one for the jury, may be closely intertwined with a dispute over whether there actually exists a legitimate and rational goal or whether the stated goal is supported only by unsubstantiated or irrational factors. In that event, the question of the existence of a legitimate governmental interest is clearly one for the jury and it is only after a finding of a legitimate government interest that the Court should make the legal determination of whether the actions of the governmental actor are rationally related to that legitimate state goal. *See id.* Specifically, this Court stated in *Del Monte Dunes*:

> The jury's role in determining whether a land-use decision substantially advances legitimate public interests within the meaning of our regulatory takings doctrine presents a more difficult question. Although our cases make clear that this inquiry involves an essential factual component, *see Yee [v. Escondido*, 503 U.S. 519, 523 (1992)], it no doubt has a legal aspect as well, and is probably best understood as a mixed question of fact and law. In this case, the narrow question submitted to the jury was whether, when viewed in light of the

> context and protracted history of the development application process, the city's decision to reject a particular development plan bore a reasonable relationship to its proffered justifications. ... As the Court of Appeals recognized, this question was "essentially fact-bound [in] nature." ... Under these circumstances, we hold that it was proper to submit this narrow, fact-bound question to the jury.

Del Monte Dunes, 526 U.S. at 721. This language clearly means that if a trial court recognizes that a plaintiff has produced evidence that defendants' actions are motivated by personal animus and, therefore, are not sufficiently related to any legitimate state interest, *see PFZ Props., Inc. v. Rodriguez*, 928 F.2d 28, 31-32 (1st Cir. 1992), the trial court should submit to the jury the question of whether the asserted state interest is rationally related to the complained of actions or is mere pretext, *see Matthews v. Lucas*, 427 U.S. at 510, and whether the complained of actions are so egregious as to "shock the contemporary conscience." *See Sacramento v. Lewis* at 847 n.8.

Finally, from the earliest formulation of the shocks the conscience standard, conduct has been measured against the community's conscience, not by the judge's conscience. *See Rochin v. California*, 342 U.S. 165, 175 (1952) ("The majority emphasize that these statements do not refer to their own consciences...") (Black, J., concurring). Even in *Sacramento v. Lewis*, this Court recognized that the measure of "conscience shocking" conduct is determined by reference to the "contemporary conscience." 523 U.S. 847 n.8. The Court did not reference the "judicial conscience."

In this case, the District Court concluded in the first summary judgment proceedings that the evidence demonstrated that "*there is a material issue of fact as to whether the Respondents blocked the Petitioners' land development plans as a matter of land use policy or because they simply did not like Mr. Corneal and wanted to keep such a 'trouble making yuppie' from erecting a home in the Township.*" The District Court continued: "At the very least, Defendants' motives are unclear, and cannot be determined as a matter of law. Determinations as to a party's motivations, like those necessary to resolve the instant matter, are within the province of the jury, not the court." (App. 51a). At that point, the District Court seemed to collapse the "improper motive" review into the question of whether the Respondents were acting in furtherance of a legitimate governmental interest, which, though not a clearly articulated approach to the role of judge and jury in these matters, resulted in the ultimate question of liability properly being left for the jury.

On the renewed motion for summary judgment, however, the District Court accepted without question that the stated land use goal was legitimate, though acknowledging that the moratorium on subdivisions was illegally enacted. The District Court concluded that the Respondents "may have acted with mixed motives; one related to a legitimate land regulation purpose (preserving land development status quo during the final approval process of the subdivision ordinance), the other related to illegitimate personal animus." (App. 22a). This time, the District Court ignored Petitioners' evidence that the Respondents' actions bore no relation to the stated goal, which itself was devised as a pretext to subject Petitioners to their abusive conduct. The District Court made the fact-bound determination that the Respondents' actions were

rationally related to a legitimate state goal, despite the array of disputed evidence on that point.

Indeed, the District Court truncated its review of the evidence, focusing only on the illegal moratorium, and ignoring all the undisputed evidence of other acts of harassment, which it had previously acknowledged would create a question of improper motive for the jury to decide. Much of the evidence – such as the false report of wetlands violations, demands for compliance with non-existent requirements unrelated to development concerns, denial of access to township ordinances, denial of the request for even an application, and the refusal to allow even a garage – concerned actions undisputedly unrelated to any concern, contrived or otherwise, over land development or subdivisions in the township. The Third Circuit then adopted the District Court's decision without question, at once repudiating this Court's directive in *Sacramento v. Lewis* that courts must review the totality of the circumstances in substantive due process determinations, and invading the province of the jury in resolving factual disputes as to motive and intent and whether challenged conduct shocks the conscience.

Even assuming that the Third Circuit was correct in applying a "rational basis" test to the Respondents' conduct for purposes of making the shocks the conscience determination, a plaintiff with evidence of improper motive and evidence of outrageous and persistent acts still must have an opportunity to have a jury decide whether the asserted rational basis was mere pretext, whether the actions furthered the stated goal, and whether the conduct as a whole shocks the contemporary conscience. *See Matthews v. Lucas*, 427 U.S. 495, 510 (1976) (plaintiff has opportunity to demonstrate insubstantiality of alleged rational relationship between executive action and legitimate governmental

purpose); *Seal v. Morgan*, 229 F.3d 567, 580 (6th Cir. 2000) ("determination of whether the school board's action was rationally related to a legitimate state interest is one of law and would be made by court. The question of what the board did, and why, would be questions of fact for the jury.").

Under any formulation of the test for determining whether an official has engaged in unconstitutional conduct, the motive and intent of the defendants are material issues. *See Sacramento v. Lewis* at 854; *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 957 (7th Cir. 2002) (Posner, J., concurring) (under equal protection rationality review, a plaintiff can demonstrate that a government action lacks a rational basis by demonstrating that the action was motivated by animus or by demonstrating that the action bears no rational relation to legitimate state policy).

Outside the context of land-use cases, the Circuit Courts of Appeal, including the Third Circuit, correctly leave to the jury the question of whether particular actions are so egregious as to rise to the level of a substantive due process violation, other than in the most obvious cases of failure to satisfy that standard. *See Estate of Smith v. Marasco*, 318 F.3d 497, 510 (3d Cir. 2003)(district court's conclusion that element of due process claim could not be proven because officers used legitimate tactics usurps the role of the jury where plaintiff presented evidence disputing officers' motives and tactics); *see also Moran v. Clarke*, 296 F.3d 638 (8th Cir. 2002) (case involving false accusations of misconduct sufficient to raise jury question as to substantive due process liability); *Conroe Creosoting Co. v. Montgomery County*, 249 F.3d 337, 342 (5th Cir. 2001) (case involving unauthorized sale of property pursuant to fraudulently obtained tax warrant sufficient to go to jury on substantive due process liability); *Wegant v. Okst*, 101 F.3d 845, 856 (2d Cir. 1996) (whether denial of medical treatment for diabetic

inmate was conscience-shocking was jury question); *Walz v. Town of Smithtown*, 46 F.3d 162 (2d Cir. 1995) (question of whether defendants conduct intentional deprivation one for jury); *see also* 4 MARTIN A. SCHWARTZ & GEORGE C. PRATT, SECTION 1983 LITIGATION: JURY INSTRUCTIONS § 6.02 (2004) (questions of intent are appropriate for jury). There is no precedent or justification for devising a standard that forces courts to encroach upon the well-established province of the jury in substantive due process cases challenging the actions of land use officials.

The Third Circuit's holding in this case has taken from the jury the critical role of weighing the parties' evidence of the existence of an alleged legitimate state interest, the alleged rational relationship between the defendants' actions and that alleged legitimate interest, and the plaintiffs' evidence that tends to disprove both. The court's holding is contrary to established precedent of this Court. Consequently, review by this Court is necessary to ensure consistency in maintaining the role of the jury in substantive due process cases.

CONCLUSION

Petitioners respectfully request this Court grant the Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully Submitted,

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